Supreme Court, U. S.
FILED
NOV 17 1977
MICHAEL RODAK, JR., CLERK

Nos. 76-1471, 76-1521, 76-1595,
76-1604, 76-1624, 76-1685

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING,
et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF AMICI CURIAE

FILED ON BEHALF OF DISPATCH PRINTING COMPANY AND THE JOURNAL COMPANY

ERWIN N. GRISWOLD
VICTOR E. FERRALL, JR.
LINDA K. SMITH
Attorneys for Amici Curiae

Of Counsel:

JONES, DAY, REAVIS & POGUE
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. Congress Has Made It Clear That It Has Delegated No Power To The Commission To Make A General Rule Denying Broadcast Licenses To Newspaper Owners 6

II. Determinations Of "Public Convenience, Interest, And Necessity" Have Been Delegated By Congress To The Commission And Not To The Courts, And The Court Below, By Itself Making Such A Determination, Exceeded The Proper Scope Of Judicial Review 11

A. The Intent, As Well As The Effect Of The Decision Of The Court Below, Was To Usurp The Commission's Responsibility To Determine The Public Interest 12

B. The Usurpation By The Court Below Of The Commission's Responsibility Was Improper 17

1. The Court Below Improperly Undertook To Weigh The Evidence 19

2. A Court May Not Conclude That An Agency Decision Is Invalid Merely Because It Would Weigh The Factors Involved In That Decision Differently Than The Agency 20

3. The Court Below Exceeded The Proper Scope Of Judicial Review By Commanding The Commission To Adopt A Specific Rule Selected By It 26

C. The Court Below Trespassed On The Principle Of Separation Of Powers 28

Page

III. The Court Of Appeals Erred In Concluding That The Commission's Determination That Its New Rule Should Not Generally Be Applied Retroactively Was Irrational 32

A. Rationality Does Not Require Retroactivity . 32

B. Retroactivity Has Not Been Required For The Validity Of Rulemaking, Legislation Or Judicial Action 35

1. Prospective-only Commission Rules 36

2. Prospective-only By Other Agencies 37

3. Prospective-only Legislation 38

4. Prospective-only Holdings By This Court And Other Courts 39

CONCLUSION 44

TABLE OF AUTHORITIES

CASES:

Action for Children's Television v. *FCC*, Case No. 74-2006 (D.C. Cir., July 1, 1977) 39
Adams v. *Illinois*, 405 U.S. 278 (1972) 42
Addison v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944) 33
Allen v. *State Bd. of Elections*, 393 U.S. 544 (1969) 40
Almeida-Sanchez v. *United States*, 413 U.S. 266 (1973) 42
American Airlines, Inc. v. *CAB*, 192 F.2d 417 (D.C. Cir. 1951) 20
American Telephone & Telegraph Co. v. *United States*, 299 U.S. 232 (1936) 30
Associated Industries of New York State, Inc. v. *Dept. of Labor*, 487 F.2d 342 (2d Cir. 1973) 21
Associated Press v. *United States*, 326 U.S. 1 (1945) .. 16
Balts v. *Balts*, 273 Minn. 419, 142 N.W. 2d 66 (1966) .. 39
Board of Trade v. *United States*, 314 U.S. 534 (1942) .. 30
Bowen v. *United States*, 422 U.S. 916 (1975) 42
Bowman Transportation, Inc. v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974) 21
Brandywine-Main Line Radio, Inc. v. *FCC*, 473 F.2d 16, (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973) . 16

Page

Buckeye Cablevision, Inc. v. *FCC*, 387 F.2d 220 (D.C. Cir. 1967) 37
Burns v. *Owens*, 459 S.W. 2d 303 (Mo. 1970) 38
Calder v. *Bull*, 3 Dall. 386 (1798) 35
Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971) 40, 42, 43
Chicot County Drainage District v. *Baxter State Bank*, 308 U.S. 371 (1940) 40
Chimel v. *California*, 395 U.S. 752 (1969) 41
Cipriano v. *City of Houma*, 395 U.S. 701 (1969) 39, 43
Citizens Communications Center v. *FCC*, 447 F.2d 1201 (D.C. Cir. 1971) 23
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971) 18, 21
City of Phoenix v. *Kolodziejski*, 399 U.S. 204 (1970) .. 40
Claridge Apartments Co. v. *Comm'r*, 323 U.S. 141 (1944) 35
Coleman v. *Alabama*, 399 U.S. 1 (1970) 42
Columbia Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94 (1972) 14. 23, 26
Columbus Broadcasting Coalition v. *FCC*, 505 F.2d 320 (D.C. Cir. 1974) 38
Committee for Open Media v. *FCC*, 533 F.2d 1 (D.C. Cir. 1976) 37
Connecticut Committee Against Pay TV v. *FCC*, 301 F.2d 835 (D.C. Cir. 1962) 20
Cornell v. *United States*, 427 F.2d 680 (2d Cir. 1970) .. 30
Daniel v. *Louisiana*, 420 U.S. 31 (1975) 42
Dawson v. *Olsen*, 94 Idaho 636, 496 P.2d 97 (1972) 38
Desist v. *United States*, 394 U.S. 244 (1969) 41
England v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964) 40
Escobedo v. *Illinois*, 378 U.S. 478 (1964) 41
Ethyl Corp. v. *EPA*, 541 F.2d 1 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976) 21
FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) 12, 27, 28, 31
FCC v. *RCA Communications, Inc.*, 346 U.S. 86 (1953) 24, 26, 31
FCC v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940) 23
FCC v. *Schreiber*, 381 U.S. 279 (1965) 30
FCC v. *WOKO, Inc.*, 329 U.S. 223 (1946) 26

Page

Federal Radio Commission v. *General Electric Co.*, 281 U.S. 464 (1930) 29, 30
Fidelity Television, Inc. v. *FCC*, 515 F.2d 684 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975) 23
Fountain v. *Fountain*, 214 Va. 347, 200 S.E.2d 513 (1973), *cert. denied*, 416 U.S. 939, *rehearing denied*, 417 U.S. 927 (1974) 39
FPC v. *Idaho Power Co.*, 344 U.S. 17 (1952) ..27, 28, 29, 31
General Telephone Company of the Southwest v. *United States*, 449 F.2d 846 (5th Cir. 1971) 33
Gilbert v. *California*, 388 U.S. 263 (1967) 41
Goller v. *White*, 20 Wis.2d 402, 122 N.W.2d 193 (1963) 39
Gosa v. *Mayden*, 413 U.S. 665 (1973) 42
Great Northern Railway Co. v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932) 38
Greater Boston Television Corp. v. *FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied sub nom. WHDH, Inc.* v. *FCC*, 403 U.S. 923 (1971) 23
Griffin v. *California*, 380 U.S. 609 (1965) 41
Grosso v. *United States*, 390 U.S. 62 (1968) 42
Halliday v. *United States*, 394 U.S. 831 (1969) 41
Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) 40
Hassett v. *Welch*, 303 U.S. 303 (1938) 35
James v. *United States*, 366 U.S. 213 (1961) 41
Jefferson Standard Broadcasting Co. v. *FCC*, 297 F. Supp. 784 (W.D.N.C. 1969) 37
Jenkins v. *Delaware*, 395 U.S. 213 (1969) 41
Johnson v. *New Jersey*, 384 U.S. 719 (1966) 41
Katz v. *United States*, 389 U.S. 347 (1967) 41
Kojis v. *Doctors Hospital*, 12 Wis.2d 367, 107 N.W. 2d 131, *modified on rehearing*, 107 N.W. 2d 193 (1963) 39
Langdell v. *Dodge*, 100 N.H. 118, 122 A.2d 529 (1956) .. 39
Lemon v. *Kurtzman*, 411 U.S. 192 (1973) 40
Linkletter v. *Walker*, 381 U.S. 618 (1965) 41, 43
Maceren v. *District Director, Immigration and Naturalization Service*, 509 F.2d 934 (9th Cir. 1974) 37
Mackey v. *United States*, 401 U.S. 667 (1971) 41
Marchetti v. *United States*, 390 U.S. 39 (1968) 42
Mapp v. *Ohio*, 367 U.S. 643 (1961) 41
Marks v. *United States*, 430 U.S. 188 (1977) 42
McClatchy Broadcasting Co. v. *FCC*, 239 F.2d 15 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957) 24

Page

Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974) 23
Michigan v. *Payne*, 412 U.S. 47 (1973) 42
Michigan v. *Tucker*, 417 U.S. 433 (1974) 41
Miller v. *California*, 413 U.S. 15 (1973) 42
Miranda v. *Arizona*, 384 U.S. 436 (1966) 41
Molitor v. *Kaneland Community Unit Dist., No. 302*, 18 Ill.2d 11, 163 N.E. 2d 89 (1959) 38
Mt. Mansfield Television, Inc. v. *FCC*, 442 F.2d 470 (2d Cir. 1970) 19, 20
National Ass'n of Independent Television Producers and Distributors v. *FCC*, 516 F.2d 526 (2d Cir. 1975) 26, 31
National Ass'n of Motor Bus Owners v. *FCC*, 460 F.2d 561 (2d Cir. 1972) 31
National Broadcasting Co. v. *FCC*, 516 F.2d 1101 (D.C. Cir. 1975), *cert. denied sub nom. Accuracy in Media, Inc.* v. *National Broadcasting Co.*, 424 U.S. 910 (1976) 28
National Broadcasting Co., Inc. v. *United States*, 319 U.S. 190 (1943) 18, 21, 22, 25, 30, 36
Niagara Mohawk Power Corp. v. *FPC*, 379 F.2d 153 (D.C. Cir. 1967) 33
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974) 38
NLRB v. *E&B Brewing Co.*, 276 F.2d 594 (6th Cir. 1960) 37
NLRB v. *Food Store Employees Union*, 417 U.S. 1 (1974) 28
NLRB v. *Majestic Weaving Co.*, 355 F.2d 854 (2d Cir. 1966) 37, 38
NLRB v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969) 38
North Carolina v. *Pearce*, 395 U.S. 711 (1969) 42
O'Callahan v. *Parker*, 395 U.S. 258 (1969) 42
Parker v. *Port Huron Hospital*, 361 Mich. 1, 105 N.W. 2d 1 (1960) 39
Public Interest Research Group v. *FCC*, 522 F.2d 1060 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976) ..25, 26
Radio Corp. of America v. *United States*, 341 U.S. 412 (1951) 30
Radio Relay Corp. v. *FCC*, 409 F.2d 322 (2d Cir. 1969) 26, 30
Red Lion Broadcasting Co., Inc. v. *FCC*, 395 U.S. 367 (1969) 14, 16, 18, 24

Page

Retail, Wholesale and Dep't Store Union v. *NLRB*, 466 F.2d 380 (D.C. Cir. 1972) 33, 37
Schwartz v. *U.S. Rubber Corp.*, 112 N.J. Super. 595, 272 A.2d 310 (1971) 39
Scripps-Howard Radio, Inc. v. *FCC*, 316 U.S. 4 (1942) . 32
SEC v. *Chenery Corp.*, 332 U.S. 194 (1946) 25, 32, 33, 34
Simpson v. *Union Oil Co.*, 377 U.S. 13 (1964) 40
South Prairie Construction Co. v. *Local 627, Operating Engineers*, 427 U.S. 800 (1976) 28
Stovall v. *Denno*, 388 U.S. 293 (1967) 41
Taylor v. *Louisiana*. 419 U.S. 522 (1975) 42
Tehan v. *United States ex rel. Shott*, 382 U.S. 406 (1966) 41
The Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 25
United States v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972) 19
United States v. *Estate of Donnelly*, 397 U.S. 286 (1970) 40
United States v. *Maher*, 307 U.S. 148 (1939) 34, 35
United States v. *McDaniel*, 7 Peters 1 (1833) 33
United States v. *Morgan*, 313 U.S. 409 (1941) 32
United States v. *Peltier*, 422 U.S. 531 (1975) 42
United States v. *Saskatchewan Minerals*, 385 U.S. 94 (1966) 31
United States v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956) 37
United States v. *Wade*, 388 U.S. 218 (1967) 41
Vermont Yankee Nuclear Power Corp. v. *Natural Resources Defense Council, Inc.*, No. 76-419, to be argued November 28, 1977, reviewing *Natural Resources Defense Council, Inc.* v. *Nuclear Regulatory Commission*, 547 F.2d 633 (D.C. Cir. 1976) ... 26
Vickers v. *Vickers*, 109 N.H. 169, 242 A.2d 57 (1968)... 39
Williams v. *United States*, 401 U.S. 646 (1971) 41

CONSTITUTION, STATUTES AND REGULATIONS:

U.S. Const. Art. I, § 9, cl. 3 35
U.S. Const. Amend. I 7, 15, 25
U.S. Const. Amend. IV 41
U.S. Const. Amend. XIV 40
5 U.S.C. § 706(2)(A) 21
5 U.S.C. § 706(2)(E) 21

Page

28 U.S.C. § 2342 27
29 U.S.C. § 201, *et seq.* .....
29 U.S.C. § 261 .....
42 U.S.C. § 1973, *et seq.* (1964 ed., Supp. I) 40
47 U.S.C. § 301 12
47 U.S.C. § 303 12
47 U.S.C. § 303(f) 12
47 U.S.C. § 303(r) 12
47 U.S.C. § 307(a) 12
47 U.S.C. § 307(d) 24
47 U.S.C. § 309(a) 12
47 U.S.C. § 310(b) 12
47 C.F.R. § 73.188 3
47 C.F.R. § 73.315 3
47 C.F.R. § 73.685 3
Fed.R. Crim. P. 11 41

MISCELLANEOUS:

Beytagh, "Ten Years of Non-Retroactivity: A Critique and a Proposal," 61 Va. L. Rev. 1577 (1975) 39
Cable Television Report and Order, 36 F.C.C. 2d 143 (1972) 36
CATV-TV Cross-Ownership Rules, 55 F.C.C. 2d 540 (1975), *reconsideration denied*, 58 F.C.C. 2d 596 (1976), *appeal pending*, No. 75-1933, *et al.*, (D.C. Cir. 1975), *motions for partial stay granted*, June 10, 1977 .....
Comment Note, "Prospective or Retroactive Operation of Overruling Decision," 10 A.L.R. 3d 1371 (1966) 39
Conference Report No. 2426, 82d Cong., 2d Sess. (1952) 11
98 Cong. Rec. 7417-7420 (1952) 11

Page

98 Cong. Rec. H9048-9049 (daily ed. July 2, 1952) 11

Distribution of Television Broadcast Signals by CATV Systems, 2 F.C.C. 2d 725 (1966) 36

Hearings on Application for Second VHF Station, 3 P&F Radio Reg. 2d 909 (1964) 36

H.R. Rep. No. 1750, 82d Cong., 2d Sess. (1952) 10

Interim Policy on Television Multiple Ownership, 5 P&F Radio Reg. 2d 271 (1965) 36

Memorandum Opinion and Order, 53 F.C.C. 2d 859 (1975) .....13, *passim*

Multiple Ownership Rules, Docket No. 20548, 63 F.C.C. 2d 824 (1977) 24, 36

Multiple Ownership of Standard, FM, and Television Broadcast Stations, 22 F.C.C. 2d 306 (1970) 36, 38

Multiple Ownership of Standard, FM, and Television Broadcast Stations, 45 F.C.C. 1476 (1964) 36

Multiple Ownership of Television Broadcast Stations, 12 P&F Radio Reg. 2d 1501 (1968) .....

Proposed Amendments to the Communications Act of 1934: Hearings on S.814 Before the Senate Comm. on Interstate Commerce, 78th Cong., 1st Sess. (1943) 8

Proposed Amendments to the Communications Act of 1934: Hearings on S.1333 Before the Senate Comm. on Interstate Commerce, 80th Cong., 1st Sess. (1947) 8

Proposed Amendments to the Communications Act of 1934: Hearings on S.1973 Before the Subcomm. on S.1973 of the Senate Comm. on Interstate and Foreign Commerce, 81st Cong., 1st Sess. (1949) 8, 9

Revision of FM Broadcast Rules, 40 F.C.C. 660 (1962) 36

Schaefer, "The Control of 'Sunbursts': Techniques of Prospective Overruling," 42 N.Y.U. L. Rev. 632 (1967) 39

Second Report and Order in Docket 18110, 50 F.C.C. 2d 1046 (1975) .....13, *passim*

Page

S. Rep. No. 741, 81st Cong., 1st Sess. (1949) 8, 9, 10, 11

Story, *Constitution,* § 1398 (1898) 34

Supreme Court Rule 42(1) 4

Testimony of Chairman Richard E. Wiley before the Senate Subcommittee on Communications, May 10, 1977 13

Telephone Terminal Equipment Rules, 59 F.C.C. 2d 83 (1976) 36

"The Supreme Court, 1968 Term," 83 Harv. L. Rev. 62 (1969) 38

Wall Street Journal, October 13, 1977, p. 1 16

Wright, Skelly, "The Courts and the Rule Making Process: The Limits of Judicial Review," 59 Corn. L. Rev. 375 (1974) 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 76-1471, 76-1521, 76-1595,
76-1604, 76-1624, 76-1685

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING,
et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF AMICI CURIAE

FILED ON BEHALF OF DISPATCH PRINTING COMPANY AND THE JOURNAL COMPANY

INTEREST OF AMICI CURIAE

The Dispatch Printing Company ("Dispatch") publishes *The Columbus Dispatch,* an independent daily evening newspaper, and *The Columbus Sunday Dispatch,* a Sunday newspaper, in Columbus, Ohio.[1] Dispatch owns all the stock of WBNS-TV Inc., licensee of WBNS-TV, Channel 10, in Columbus.[2] Dispatch

---

[1] The *Dispatch* competes with a daily morning newspaper, *The Columbus Citizen-Journal,* published by the E. W. Scripps Company.

[2] Dispatch also owns WTHR(TV) in Indianapolis, Indiana.

shareholders also own RadiOhio, Inc., licensee of radio stations WBNS(AM) and WBNS-FM, Columbus. Dispatch began broadcasting AM radio in 1934, and built the Columbus FM station in 1939,[3] and TV station in 1957.

The Journal Company ("Journal") is the publisher of *The Milwaukee Journal,* an independent daily evening and Sunday newspaper, and *The Milwaukee Sentinel,* an independent daily morning newspaper, in Milwaukee, Wisconsin. Journal owns all the stock of WTMJ, Inc.. licensee of WTMJ-TV, Channel 4, in Milwaukee, and of WTMJ(AM) and WKTI(FM) in Milwaukee.[4] Journal built its stations and put them on the air, AM in 1927, TV in 1947 and FM in 1940.

The Journal Company is owned by its employees.[5] This system of employee ownership is unique and guarantees that the company will be owned by people who live in and are involved in the local community.

---

[3] WBNS-FM's call letters when it first went on the air were W8XVY.

[4] WTMJ, Inc. also owns Teltron, Inc. which operates cable television systems in Wausau, Wisconsin Rapids, and Stevens Point, Wisconsin.

[5] Starting in 1937, shares of The Journal Company stock were placed in trust. Employees can buy a "unit of beneficial interest," which confers all the rights of common voting stock ownership, except that the units must be resold to other active employees when an owner ceases to be an employee. Units are allocated on the basis of each employee's responsibility, leadership, contributions to the success of the company and length of service. Employees of WTMJ, Inc. as well as employees of The Journal Company participate in this employee ownership arrangement. Currently, 1316 employees are unit holders of over 88% of the total stock of The Journal Company.

After a seven year rulemaking proceeding, the Federal Communications Commission (hereinafter "the Commission") adopted rules forbidding the prospective formation of combinations of a newspaper and a broadcast station (radio or television) located in the same community,[6] but limiting retroactive application of the rule to existing combinations located in communities served by only one daily newspaper and one broadcast station. In the case of one newspaper-one broadcast station communities, the Commission order required one of these interests to be divested within five years.

The court of appeals upheld the prospective portion of the rules (FCC App. A, p. 33),[7] but held invalid the Commission's determination not to apply the cross-ownership rule retroactively. (FCC App. A, p. 60.)[8]

The Commission rule invalidated by the court of appeals would have permitted Dispatch and Journal to retain their co-located newspaper and broadcast stations so long as the stations continue to serve the public interest. The decision of the court of appeals, if upheld, would affect Dispatch and Journal substantially and adversely, by forcing each of them to divest

---

[6] That is, ownership of a newspaper located within the City Grade signal, *i.e.*, primary service area, of a commonly owned broadcast station. *See* 47 C.F.R. §§ 73.685, 73.315, 73.188. For ease of reference, such co-location is referred to herein as "in the same community."

[7] References to appendices are to those contained in the Appendix filed by the Federal Communications Commission to its petition for a writ of certiorari.

[8] WBNS-TV, Inc. and The Journal Company and WTMJ participated in the Federal Communications Commission rulemaking proceeding, but were not intervenors in the court below.

either its newspaper or its broadcast stations, located respectively in Columbus and Milwaukee, unless each could make a showing of special circumstances. (FCC App. A, p. 60.)

Dispatch and Journal have obtained written consent of all the parties below to the filing of this brief as *amici curiae* pursuant to Rule 42(1) of the Rules of this Court, and have filed these consents simultaneously with this brief.

SUMMARY OF ARGUMENT

The Commission, after a lengthy rulemaking proceeding, adopted a rule in regard to the cross-ownership of newspapers and broadcast stations, which prohibited future combinations of commonly owned broadcast facilities in the same community, permitted the continued existence of such combinations in communities with more than one media outlet, and required divestiture in communities where there was only one media voice. The court below upheld the Commission's prospective ban, but invalidated the "grandfathering" and ordered the Commission to adopt a specific rule in regard to existing cross-ownerships which gives diversity of ownership "controlling weight."

Congress has indicated that it did not delegate to the Commission the power to make a general rule which denies broadcast licenses to newspaper owners. The question was fully considered in 1952, and Congress concluded that the Commission had no such power. Thus, the Commission could not promulgate any blanket rule in regard to the grant or denial of broadcast licenses to newspaper owners, including the prospective rule upheld by the court below.

By replacing the rule in regard to cross-ownership selected by the Commission with a rule more to its liking, the court below improperly usurped a basic policy judgment allocated by Congress to the Commission. It improperly immersed itself in weighing the evidence to restrike the balance between permitting and prohibiting cross-ownership. But a reviewing court may not invalidate an agency decision merely because it would weigh the factors involved in that decision in a manner different from the balancing engaged in by the agency. Nor may a reviewing court command the Commission to adopt a specific rule selected by it. Thus, the court below both exceeded the proper scope for judicial review and trespassed beyond the boundaries established by the separation of powers.

The court of appeals also determined that the Commission's decision limiting the impact of its cross-ownership ban to future acquisitions or constructions of broadcast facilities was irrational. (FCC App. E, p. 165.) This determination flies in the face of the history of administrative, legislative and judicial action, and of common sense. It can be read as little more than a statement that the court may enforce its own policy in regard to cross-ownership, and not that of the Commission.

The briefs of the various petitioners in this case present a variety of issues, which need not be reviewed or restated here.[9] This brief concentrates on the three

---

[9] Amici endorse the positions taken by other parties: (1) that the Commission lacks authority to adopt blanket rules prohibiting newspaper ownership of broadcast stations; and (2) opposing the requiring of divestiture by newspapers of broadcast stations now owned by them.

questions summarized briefly above, namely:

1. Did the court below and the Commission wrongfully conclude that the Commission had the authority to promulgate a general rule prohibiting the grant of licenses for broadcast facilities to newspaper owners?
2. Does the decision of the court of appeals improperly usurp the function allocated by Congress to the Federal Communications Commission, in view of the fact that Congress assigned to the Commission, and not to the courts, the responsibility to determine the "public interest, convenience and necessity" in regulating broadcast licensing?
3. Was the Commission acting reasonably within its delegated powers when it changed its rules and practices only with respect to prospective cross-ownership of newspapers and broadcast facilities?[10]

ARGUMENT

I.

CONGRESS HAS MADE IT CLEAR THAT IT HAS DELEGATED NO POWER TO THE COMMISSION TO MAKE A GENERAL RULE DENYING BROADCAST LICENSES TO NEWSPAPER OWNERS.

The initial question in this group of cases is whether Congress has delegated to the Commission any authority to refuse to issue a broadcast license on the ground of common ownership of a broadcast station with a newspaper, or to refuse to renew a broadcast license

[10] The question of the few communities in which the only print and broadcast media were commonly owned, the so-called "egregious cases," dealt with separately by the Commission, is not considered in this brief.

in that circumstance. This question raises problems of delegation of powers. It also raises problems under the First Amendment, and these are important in two aspects, first, as to the constitutional power of Congress, and second, as to the effect which such constitutional questions should have on the construction of the power which Congress has actually delegated to the Commission.

These questions are discussed in full in briefs filed by the parties in this case, particularly in the briefs filed by the American Newspaper Publishers Association and the National Association of Broadcasters. Although this brief is primarily devoted to the question of the "grandfather clause" in the Commission's order, the interest of the *amici curiae* will be protected if it is decided that the Commission did not have power delegated to it to make a rule placing a special restriction on the ownership of broadcast stations by newspapers. Accordingly, the *amici curiae* fully support the briefs filed by the parties which contend that the Commission has no such power. If this contention is upheld, then the "grandfather" question is no longer relevant.

There is one aspect of the question of the Commission's basic power to which it is appropriate to call special attention. The fact is that Congress has considered this question, and has made it as clear as it is possible to do without an actual statutory provision that the Commission has not been given power to discriminate against newspapers in the licensing of broadcast facilities.

This specific question, which Congress had been considering for about a decade,[11] was presented to and acted upon by Congress in 1952. Previously, in 1949, a bill, S. 1973, designed to amend several sections of the Communications Act of 1934 was pending before a Senate subcommittee. One of the proposals under consideration was an amendment introduced by Senator Ernest McFarland which was intended to deny the Commission the power to restrict ownership of broadcast facilities by newspapers.[12] The Acting Chairman of the Commission, Rosel Hyde, testified before the subcommittee of the Senate Committee on Interstate and Foreign Commerce that the Commission did not have power to make a blanket rule preventing all persons engaged in a particular business, such as publishing newspapers, from obtaining a license, even if such action was believed to be in the public interest. *Proposed*

[11] *Proposed Amendments to the Communications Act of 1934: Hearings on S. 814 Before the Senate Comm. on Interstate Commerce,* 78th Cong., 1st Sess. 80-85 (1943); *Proposed Amendments to the Communications Act of 1934: Hearings on S. 1333 Before the Senate Comm. on Interstate Commerce,* 80th Cong., 1st Sess. (1947).

[12] The amendment provided:

> "No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the Commission and as authorized by law. The Commission shall make or promulgate no rule or regulation of substance or procedure, the purpose or result of which is to effect a discrimination between persons based upon race, religious or political affiliation, or kind of lawful occupation or business association."

S. Rep. No. 741, 81st Cong., 1st Sess. 3 (1949). In regard to this amendment, the Acting Chairman of the Commission, Rosel Hyde, submitted written testimony stating: "The principal intent of the section is, of course, to outlaw the possibility of any rule excluding newspaper owners from owning radio stations." *Proposed Amendments to the Communications Act of 1934: Hearings on S. 1973 Before the Subcomm. on S. 1973 of the Senate Comm. on Interstate and Foreign Commerce,* 81st Cong., 1st Sess. 20-21 (1949).

Amendments to the Communications Act of 1934: Hearings on S. 1973 Before the Subcomm. on S. 1973 of the Senate Comm. on Interstate and Foreign Commerce, 81st Cong., 1st Sess. 42-44, 103-105 (1949).

After Chairman Hyde's testimony, the subcommittee eliminated the proposed amendment from the bill. When the full committee reported the bill to the Senate floor, it commented on the reasons for omitting the amendment:

> "This language was first proposed nearly 6 years ago during hearings on a Communications Act amendments bill, solely because the Federal Communications Commission at that time had under consideration a rule which would prohibit newspapers from becoming holders of radio licenses. While the Commission may have been motivated, in part at least, by the best intentions in seeking to prevent monopolistic control of organs of public expression in a community, its threatened action was of questionable constitutional validity, particularly in the absence of specific authority in the basic act to adopt such a rule. However, the net effect of the Commission's proposed antinewspaper rule was to deny consideration of applications from newspapers, all such applications having been placed in a pending file. After reflection for some 2 years, the Commission dropped all plans for such a rule and began processing of newspaper applications in the same manner as other applications.

S. Rep. No. 741, 81st Cong., 1st Sess. 2 (1949).

After summarizing the Commission's testimony, the committee concluded:

> It should be distinctly understood that in eliminating the section the committee has done so solely because the Commission is now following

> the procedure which was outlined in the section, has testified that it intends to follow that procedure, and that it is of the opinion that it has no legal or constitutional authority to follow any other procedure.

S. Rep. No. 741, 81st Cong., 1st Sess. 3 (1949).

In 1951, a bill, S. 658, which was almost identical to the final version of S. 1973 was adopted by the Senate and went to the House. The House adopted an amendment which provided that:

> "The Commission shall not make any rule or regulation, of substance or procedure, the purpose or result of which is to effect a discrimination between persons based upon interest in, association with, or ownership of any medium primarily engaged in the gathering and dissemination of information and no application for a construction permit or station license, or for the renewal, modification or transfer of such a permit or license, shall be denied by the Commission solely because of any such interest, association, or ownership."

H.R. Rep. No. 1750, 82d Cong., 2d Sess. 9 (1952).

When the bill went to conference, the Conference Committee eliminated the House amendment. But the Conference Committee Report made it clear that the provision was omitted because the Conference Committee found it unnecessary. It stated:

> "It is the view of the conference committee that under the present law the Commission is not authorized to make or promulgate any rule or regulation the effect of which would be to discriminate against any person because such person has an interest in, or association with, a newspaper. . . . Also the Commission could not arbitrarily deny any application solely because of any such interest or association."

Conference Report No. 2426, 82d Cong., 2d Sess. 19 (1952). The discrimination to which the amendment responded, and which the Conference Report stated the Commission was not authorized to make, was against the denial of broadcast licenses by the Commission because the prospective licensee was commonly owned with newspapers or news disseminating agencies. 98 Cong. Rec. 7417-7420 (1952); 98 Cong. Rec. H9048-9049 (daily ed. July 2, 1952).

Thus, Congress, by formal, published action, approved by both Houses of Congress, made it clear that it did not regard the Commission as having any power delegated to it to discriminate against newspapers in the ownership of broadcast facilities. The views of Congress may or may not have changed in the meantime. When Congress has denied that it has made a delegation of power, however, such a delegation can hardly be inferred from subsequent inaction. In view of the delicacy of the area, and the nationwide impact of any change, this clear delineation of the Commission's powers should remain binding on it until Congress determines to extend the powers which it said it did not delegate when it last formally gave consideration to this question.

II.

DETERMINATIONS OF "PUBLIC CONVENIENCE, INTEREST, AND NECESSITY" HAVE BEEN DELEGATED BY CONGRESS TO THE COMMISSION AND NOT TO THE COURTS, AND THE COURT BELOW, BY ITSELF MAKING SUCH A DETERMINATION, EXCEEDED THE PROPER SCOPE OF JUDICIAL REVIEW.

The Communications Act of 1934 provides not only that the Commission shall make regulations to carry

out the provisions of the Act, 47 U.S.C. § 303(f),[13] but also that:

> "The Commission, if public convenience, interest, or necessity will be served thereby, . . . shall grant to any applicant therefor a station license provided for by this Chapter." 47 U.S.C. § 307(a).[14]

Congress thus delegated to the Commission the authority both to determine what radio or television license applicants shall be granted licenses and to make regulations to implement such determinations in the "public convenience, interest, and necessity."[15]

A. The Intent, As Well As The Effect Of The Decision Of The Court Below, Was To Usurp The Commission's Responsibility To Determine The Public Interest.

Pursuant to this licensing and rulemaking authority, the Commission determined that the public interest would be promoted by (1) prohibiting future com-

[13] Section 303, 48 Stat. 1082, as amended, 47 U.S.C. § 303(f) provides, in pertinent part, that "the Commission from time to time, as public convenience, interest, or necessity requires shall—[m]ake such regulations not inconsistent with law as it may deem necessary . . . to carry out the provisions of this Act . . ." *See also* 47 U.S.C. § 303(r).

[14] *See also* 47 U.S.C. §§ 301, 303(r), 309(a) and § 310(b).

[15] This Court has long recognized the Commission's delegated responsibility for licensing decisions. It has stated in regard to licensing that:

> "'public convenience, interest, or necessity' was the touchstone for the exercise of the Commission's authority. While this criterion is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

binations of daily newspaper and broadcasting stations in the same community; (2) breaking up within five years existing combinations of daily newspaper and broadcasting stations in communities where there was no other media voice; and (3) permitting continued operation, or "grandfathering," of existing combinations in communities with other media outlets. (FCC App. B, pp. 90-91.)[16]

The court of appeals disagreed with the Commission's decision in regard to existing cross-ownerships. It disregarded the results of an extensive, seven year long rulemaking proceeding conducted by the Commission, in which, if the Commission had power, it was engaging in what is clearly delegated legislative action.[17] Should the decision of the court below be permitted to stand, it would transform patterns of ownership of newspaper and television and radio stations,[18] developed as a result of actions of and policies established by the Federal Communications Commission,[19]

[16] Second Report and Order in Docket 18110, 50 F.C.C.2d 1046 (1975); Memorandum Opinion and Order, 53 F.C.C.2d 859 (1975). (FCC App. B and C, pp. 61-158.)

[17] *See* text, *supra*, pp. 11-12, and n. 13 and n. 14, at p. 12, *supra*.

[18] Respondents acknowledge the "considerable impact" of the decision below. Opposition to Petitions for a Writ of Certiorari, at 7.

[19] *See* Testimony of Chairman Richard E. Wiley before the Senate Subcommittee on Communications, May 10, 1977:

> "For many years, the Commission encouraged newspaper-broadcast cross-ownership because of the important contribution it believed such owners would make to the development of radio and, later, television broadcasting. The Commission repeatedly found that licensing broadcast stations to newspaper owners in the same community was in the public interest and otherwise consistent with agency policy."

which have served the public well for more than 50 years. The decision below would do this without any action by Congress and against the considered judgment of the agency established by Congress to formulate policy in this area. The court of appeals did not decide that the Commission cannot make a particular rule (as was unsuccessfully contended in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), for example). Rather, the court below has commanded that the Commission make the particular rule selected by the court. That is essentially legislative action. No case is known of such judicially mandated legislative action. Surely, a court could not properly command Congress to pass such a statute, and, under proper concepts of separation of powers, it should have no power to command affirmative legislative action by Congress' delegatee. Indeed, this Court refused to order the adoption of a legislative rule in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1972),[20] reflecting the long-standing principle that it is the administrative agency, to which Congress has delegated legislative authority, and not the courts, which is to make legislative rules.

In the opinion of the court below, "the Commission could not have rationally concluded that the compet-

[20] In that case, the Commission refused to adopt a rule requiring broadcasters to accept editorial advertisements. The court of appeals disagreed. It "remanded the case to the Commission to develop procedures and guidelines for administering a First Amendment right of access." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra*, 412 U.S. at 97. Even though the court of appeals remanded the case to the Commission to develop principles in accord with its decision, whereas here the court of appeals directed the principles to be adopted, this Court refused to order the Commission to adopt what was essentially a legislative rule developed by the court of appeals. *Id.*

ing policies it offered justified grandfathering absent a show of harm." (FCC App. A, p. 56.) It therefore ordered that "divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest." (FCC App. A, p. 60.) It did not, therefore, simply remand to the Commission for further rulemaking consistent with its opinion, but rather "required" that a specific rule be adopted because, in the court's view, it is the only rational rule. (FCC App. A, pp. 56, 60, and FCC App. E, p. 165.)

There can be no doubt that the court of appeals did not intend simply to remand for a consistent result, but rather its purpose was to compel adoption of the rule favored by it. In granting a stay of its mandate, it said (FCC App. E, p. 167):

> "Since the only consistent and court-approved policy in this field was that which we approved in affirming the Commission's prospective rules [prohibition of cross-ownership], and because no valid reasons had been given by the Commission for departing from this policy of giving diversity of media ownership controlling weight, we ordered the Commission to take further steps to ensure that everyone [all existing as well as prospective cross-owners] would be consistently treated under the standard already adopted for new license applicants (subject, of course, to an appropriate waiver procedure, which we also ordered the Commission to adopt. . . .)."

The Commission and the court of appeals did not disagree on several of the factors which comprise the public interest. There was no disagreement, for example, that the First Amendment objectives of preserving "an uninhibited marketplace of ideas in which

truth will ultimately prevail . . . ," *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969), and that nurturing "the widest possible dissemination of information from diverse and antagonistic sources . . . ," *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945), are appropriate factors in determining the public interest.[21] But the court of appeals clearly dis-

[21] Both the Commission and the court of appeals took as a common point of origin that any analysis of the First Amendment questions raised by this case starts with the presumption that the inherent scarcity of the broadcast spectrum necessitates, and, indeed, justifies some sort of government regulation. *See, e.g., Red Lion Broadcasting Co.* v. *FCC, supra.* It may be, however, that this part of the doctrine of broadcast regulation needs review and rethinking.

The broadcast spectrum may be no longer such a scarce resource. As *The Wall Street Journal* recently described, October 13, 1977, p. 1, there has been a tripling of the number of applications for ultra high-frequency or UHF channels over two years ago. It also reported that there are 400 unused UHF channels available for commercial broadcasting, as well as approximately 80 very high-frequency or VHF channels. There have been large advances in satellite, cable, microwave and other technologies in recent years. These developments may mean that scarcity is no longer an adequate foundation on which to erect a complex structure of First Amendment and regulatory values. As Judge Bazelon has pointed out, there are more broadcast stations than daily newspapers, and neither the radio nor the television spectrum is completely filled. For this, and other reasons, Judge Bazelon concluded that the time to re-examine the scarcity doctrine may be here. *Brandywine-Main Line Radio, Inc.* v. *FCC*, 473 F.2d 16, 64-79 (D.C. Cir. 1972) (Bazelon, J., dissenting), *cert. denied*, 412 U.S. 922 (1973). *Cf.* Judge Bazelon's view of scarcity in the decision below. (FCC App. A, pp. 22-23, n. 31.)

Even if it is assumed, *arguendo*, that the broadcast spectrum is a scarce resource, this notion does not justify or compel divestiture of existing facilities. Nor do the implications of the scarcity argument cut with equal force in radio and television, in markets with three stations and markets with thirty, in markets with their own local weekly newspapers or own magazines and those which have none. These substantive considerations were ignored by the court below, which recited the word "scarcity" as a kind of unquestioned and unquestionable truth.

"Scarcity" is only another word for "value." How to maximize or distribute the value of the broadcast spectrum is an area entrusted by Congress to the Commission as part of its mandate to administer this resource in the public interest. The public interest demands diversity of voices, *i.e.*, "outlets of self-expression," not diversity of ownership. In some cases, "voice diversity" and "ownership diversity" may go hand in hand; in others, they may not. In order to sift out such complicated choices, Congress mandated that the public interest in the effective use of the broadcast spectrum be determined through rules devised on the basis of experience and expert judgment, rather than through rigid judicial assertions of logic.

agreed with the Commission about (1) who is to make the decision that these objectives will be promoted, and (2) what factors should enter that decision, and their appropriate weights.

B. The Usurpation By The Court Below Of The Commission's Responsibility Was Improper.

The court of appeals would eliminate the Commission's authority to weigh competing public interest licensing considerations where cross-ownership of daily newspaper and broadcast facilities is involved. In all cases where cross-ownership exists, the court commands the Commission to refuse to grant a license in the absence of a showing that the cross-ownership is in the public interest sufficient to rebut the "presumption" "compelled" against it. (FCC App. A, p. 60.) Thus divestiture becomes the rule, not the exception. The Commission, on the other hand, sought to promote the objective of a free, competitive, marketplace of ideas disseminated from diverse sources by grandfathering, which permits gradual evolution by marketplace

transfers rather than revolution by forced sale of properties in 50 television markets and 160 newspaper-radio combinations. Thus, under the Commission's view, divestiture was to be the exception not the rule.

By thus reformulating the rule in regard to cross-ownership, the court substituted its judgment for that of the Commission as to what cross-ownership rule would best promote the public interest. This decision usurps the Commission's congressionally mandated responsibility by transferring a basic policy judgment from the Commission to the court.[22] It thus violates the separation of powers. This Court has stated that: "This mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power 'not niggardly but expansive'." *Red Lion Broadcasting Co.* v. *FCC, supra,* 395 U.S. at 380, *quoting National Broadcasting Co.* v. *United States,* 319 U.S. 190, 219 (1943).

It is a "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . ." *Red Lion Broadcasting Co.* v. *FCC, supra,* 395 U.S. at 381. A reviewing court "is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 416 (1971). Yet the court of appeals did not follow the Commission's construction of Section 303 of the Communications Act, the public

[22] The court of appeals conceded that it was dealing with a policy matter. It stated: "We summarize the record only to the extent necessary to show that in determining its divestiture policy, the Commission necessarily had to rely on *policy,* not factual considerations." (FCC App. A, pp. 37-38; emphasis added.)

interest mandate. Rather, it exceeded the proper scope for judicial review by substituting its judgment for that of the Commission.

1. *The Court Below Improperly Undertook To Weigh The Evidence.*

The court of appeals based its conclusion that divestiture of all cross-owned facilities is required on its own weighing of the record evidence. (FCC App. A, pp. 49, 52-58.) But this Court has expressly stated that in judicial review (speaking of the Interstate Commerce Commission):

> "We do not weigh the evidence introduced before the Commission; we do not inquire into the wisdom of the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported."

United States v. *Allegheny-Ludlum Steel Corp.,* 406 U.S. 742, 749 (1972).[23]

The Court of Appeals for the Second Circuit, in a case involving the Federal Communications Commission, reached a similar result. It stated that it is not a reviewing court's "function to weigh the evidence in support of these various points of view. [A court] should not, and indeed cannot, substitute [its] judgment for that of the Commission." *Mt. Mansfield Television, Inc.* v. *FCC,* 442 F.2d 470, 482 (2d Cir. 1970).

[23] Of course, as discussed below, an inquiry into the rationality of the conclusions reached by an administrative agency cannot be used by a reviewing court to mask its disagreement with the wisdom of the agency's policies.

That court also concluded that it was the Commission's proper function to make estimates and forecasts based on the record evidence.[24] The "fact that there is vigorous disagreement as to the effect of the rule does not prevent the Commission from acting or require this court to reassess the probabilities." *Ibid.* at 483-484. By reweighing and rebalancing the evidence in order to reach its own conclusion in regard to divestiture, the court below exceeded the proper scope of judicial review.

2. *A Court May Not Conclude That An Agency Decision Is Invalid Merely Because It Would Weigh The Factors Involved In That Decision Differently Than The Agency.*

An administrative decision may not be set aside by a reviewing court unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

---

[24] In *American Airlines, Inc.* v. *CAB*, 192 F.2d 417, 420 (D.C. Cir. 1951), the court of appeals stated, in regard to certificates of public convenience and necessity to be issued by the Civil Aeronautics Board, that—

> "the regulatory function . . . is a forward-looking function, as any examination of regulatory measures easily demonstrates. . . . When a regulatory action contemplates a proposed development, new, not existing, a type of judgment is required which is wholly absent from the mere evaluation of past facts to ascertain a present or past fact. It is in the exercise of that sort of judgment that the much discussed expertise of administrative agencies finds its greatest value. Here is the field of uncertainties, imponderables and estimates. This is where the rule that a conclusion within the realm of rational deduction or inference stands despite differences of opinion, has its greatest applicability."

See also Connecticut Committee Against Pay TV v. *FCC*, 301 F.2d 835, 837 (D.C. Cir. 1962).

law." 5 U.S.C. § 706(2)(A).[25] To reach this question, a reviewing court may consider only whether the administrative decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc.* v. *Volpe, supra,* 401 U.S. at 416;[26] *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).

There can be no doubt that the Commission engaged in extensive "consideration" of the various factors relevant to the public interest which were raised in the course of the rulemaking. The Commission's order was based on many thousands of pages of written evidence, including the submission of one or more sets of comments and studies by over 200 parties, and two and one half days of argument by some 45 scheduled parties. The Commission orders occupy 118 pages.[27] The court of appeals, however, concluded not that

---

[25] While there is some question as to whether this standard or the so-called "substantial evidence" standard for judicial review, 5 U.S.C. § 706(2)(E), applies, the issues raised by the court of appeals decision would be the same in either case in light of the extensive record developed in this proceeding. Indeed, some courts have concluded that the differences between sections 2(A) and 2(E) are more apparent than real. *See, e.g., Associated Industries of New York State, Inc.* v. *Dept. of Labor*, 487 F.2d 342, 349-350 (2d Cir. 1973) (Friendly, J.).

[26] At least one panel of the Court of Appeals for the District of Columbia Circuit has recognized that the reference to "error of judgment" does not replace or change the traditional arbitrary and capricious standard of review. *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 34-35, n. 74 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976).

[27] This Court found the extent of the record developed by the Commission in regard to Chain Broadcasting Regulations significant. *See National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 195, 225.

there had been insufficient "consideration," but that the Commission in weighing the relevant factors, had failed to reach the "proper" balance of them, a balance in which divestiture was required.

The Commission's decision resulted from consideration of many significant factors in addition to promotion of diversity of information sources, including: (1) potential dislocation of existing service (FCC App. B, p. 93); (2) the benefits of existing local ownership and involvement in broadcast operations (FCC App. B, p. 93); (3) the superior past performance of many cross-owners (FCC App. B, p. 93, n.26); (4) the existence of competing media voices in affected communities (FCC App. B, p. 96); and (5) the potential for deterioration in local programming service and quality which might result from purchasers of divested stations bearing burdensome capital costs (FCC App. B, p. 93). The Commission found no harm to the public interest resulted from the existing cross-ownerships which it concluded should be grandfathered. (FCC App. B, pp. 90, 95, 104.) In such a circumstance, basic equitable considerations weigh heavily against divestiture.[28]

The Commission properly paid particular attention to the local and service aspects of broadcasting in assessing the relative weight to be given these factors. This Court has endorsed this emphasis on localism and on service in stating that: "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts." *FCC* v. *Sanders Brothers Radio Station,*

[28] *Cf. National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 207.

309 U.S. 470, 475 (1940). The court of appeals had previously endorsed the Commission's view that superior past performance by a licensee is an important public interest consideration. It has stated: "The court recognizes that the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service." *Citizens Communications Center* v. *FCC,* 447 F.2d 1201, 1213, n. 35 (D.C. Cir. 1971). It has also stated that "The proper weight to be given past performance is, of course, a matter for the Commission's judgment." *Fidelity Television, Inc.* v. *FCC,* 515 F.2d 684, 709 (D.C. Cir.), *cert. denied,* 423 U.S. 926 (1975). But the court of appeals has now written the local service and past performance concepts out of the statute in cases involving cross-ownership.

Nowhere has this Court stated that diversity of information sources, either on a local or a national level, is the overriding or determinative element of the public interest.[29] In fact, until now, the court of appeals itself has never raised diversity to such a preeminent position. Indeed, it has done the opposite. It has said that "avoiding concentration of control in communication is such an important objective that the Commission must be accorded discretion in choice of measures for its fulfillment." *Greater Boston Television Corp.* v. *FCC,* 444 F.2d 841, 860 (D.C. Cir. 1970), *cert. denied*

[29] The court below rested its opinion on the central importance to the First Amendment of diversity. But the First Amendment does not *require* content diversity, let alone ownership diversity, nor does it require any particular form of governmental regulation to be adopted to promote diversity. *See Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94 (1972).

sub nom. WHDH, Inc. v. *FCC,* 403 U.S. 923 (1971). In regard to competing license applications, the court of appeals has held that the Commission was entitled to consider diversification of control "in connection with all other relevant factors and to attach such significance to it as its judgment dictates." *McClatchy Broadcasting Co.* v. *FCC,* 239 F.2d 15, 18 (D.C. Cir. 1956), *cert. denied,* 353 U.S. 918 (1957).

In this case, the court of appeals has decided that the Commission should no longer be accorded discretion in choosing measures to fulfill the objectives of diversity.[30] Neither the protections afforded by the Fairness Doctrine,[31] nor the Commission's ability to review license performance in triennial license renewal proceedings, 47 U.S.C. § 307(d), nor the Commission's authority to issue further rules to prevent abuses,[32] are considered appropriate measures. The Commission's judgment as to the "significance" to be accorded diversification of control and its expert ability to consider it as one of a number of public interest factors is trampled by the determination of the court below that its policy of "giving diversity of media ownership con-

[30] Only in waiver situations (FCC App. A, p. 60) would the court of appeals accord the Commission any discretion at all. But this Court has said that the public interest standard "no doubt leaves wide discretion and calls for imaginative interpretation." *FCC* v. *RCA Communications, Inc.,* 346 U.S. 86, 90 (1953).

[31] *See Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969).

[32] For example, the Commission has recently issued a Report and Order in regard to rules to prohibit certain other forms of concentration of control, *e.g.,* ownership of three broadcast stations where any two are within 100 miles of the third, or where the primary service contour of related stations overlaps. ***Multiple Ownership Rules,*** Docket No. 20548, 63 F.C.C.2d 824 (1977).

trolling weight" must be followed. (FCC App. E, p. 167.)

The elevation of ownership diversity as the *sine qua non* of "relevant factors" represents a policy judgment by the court of appeals that displaces the Commission's judgment with its own. Yet, competing policy judgments are the very "area where administrative judgments are entitled to the greatest amount of weight by appellate courts." *SEC* v. *Chenery Corp.,* 332 U.S. 194, 209 (1946). The Commission considered and weighed the factors relevant to this policy determination. It struck a balance between no rule at all, and a rule—now ordained by the court of appeals—ordering total divestiture. "The court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors." *The Permian Basin Area Rate Cases,* 390 U.S. 747, 792 (1968).[33]

The importance of following this precept is heightened because "Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed

[33] *Cf. National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 218, where the Court stated: "We would be asserting our personal views regarding the effective utilization of radio were we to deny that the Commission was entitled to find that the large public aims of the Communications Act of 1934 comprehend the considerations which moved the Commission in promulgating the Chain Broadcasting Regulations." *Accord: Public Interest Research Group* v. *FCC,* 522 F.2d 1060, 1066 (1st Cir. 1975), *cert. denied,* 424 U.S. 965 (1976), where the court warned that it could not reverse the Commission "[unless] the standard of rationality is to be narrowed to a circle no wider than a court's private judgments. . . ."

is a task of great delicacy and difficulty." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra,* 412 U.S. at 102. Thus, the Court concluded, a reviewing court "must afford great weight to the decisions of Congress and the experience of the Commission." *Ibid.* In short, a reviewing court, within the context of "the vaguish, penumbral bounds expressed by the standard of 'public interest' " must do no more than "to say whether the Commission has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear on applications for licenses in the public interest." *FCC* v. *RCA Communications, Inc.,* 346 U.S. 86, 91 (1953).[34] The court of appeals did more. It therefore went beyond the boundaries of proper judicial review.[35]

---

[34] *See FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946): "But it is the Commission, not the courts, which must be satisfied that the public interest will be served by renewing the license. And the fact that we might not have made the same determination on the same facts does not warrant a substitution of judicial or administrative discretion since Congress has confided the problem to the latter." This precept applies as much to rulemaking as to adjudication. *See also Public Interest Research Group* v. *FCC,* 522 F.2d 1060, 1064 (1st Cir. 1975), *cert. denied,* 424 U.S. 965 (1976): "We have no license to regulate broadcasting nor to impose our private views of the public welfare." *Accord: Radio Relay Corp.* v. *FCC,* 409 F.2d 322, 326 (2d Cir. 1969); *National Ass'n of Independent Television Producers and Distributors* v. *FCC,* 516 F.2d 526, 534 (2d Cir. 1975).

[35] *Cf. Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, No. 76-419, to be argued November 28, 1977, reviewing *Natural Resources Defense Council, Inc.* v. *Nuclear Regulatory Commission,* 547 F.2d 633 (D.C. Cir. 1976).

3. *The Court Below Exceeded the Proper Scope Of Judicial Review By Commanding The Commission To Adopt A Specific Rule Selected By It.*

The court of appeals ordered the Commission to adopt (FCC App. A, p. 60) a rule that would afford "controlling weight" to diversification. (FCC App. E, p. 167.) As this Court has said, it is a "guiding principle . . . that the function of the reviewing court ends when an error of law is laid bare. At that point, the matter once more goes to the Commission for reconsideration." *FPC* v. *Idaho Power Co.,* 344 U.S. 17, 20 (1952). The reviewing court having corrected an error of law, ". . . on remand the Commission is bound to act upon the correction." *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 145 (1940). Here, contrary to the Court's instruction in *FPC* v. *Idaho Power Co., supra,* the court of appeals itself determined what rule the Commission should promulgate after remand. But the court of appeals had exhausted its congressionally-granted powers[36] when it laid bare what it regarded as the Commission's error, and compelled obedience to its correction. *FCC* v. *Pottsville Broadcasting Co., supra,* 309 U.S. at 145.

The Memorandum of the United States concedes this point. The Solicitor General states:

> "The United States agrees with the Commission, however, that the court of appeals exceeded its authority to the extent that it went beyond setting aside the Commission's order and purported finally to decide administratively unresolved questions concerning cross-ownership in advance of their consideration by the Commission in proceedings on

---

[36] *See* 28 U.S.C. § 2342, which provides for judicial review of final orders of the Commission in rulemaking proceedings.

remand. See *South Prairie Construction Co.* v. *Local 627, Operating Engineers,* 427 U.S. 800; *Federal Power Commission* v. *Idaho Power Co.,* 344 U.S. 17, 20. After identifying the deficiencies in the Commission's reasoning, the court of appeals should have remanded the case to the Commission, leaving that agency free, in the exercise of its discretion, to formulate a new rule properly based on a reasoned application of the governing legal principles."

Memorandum of the United States, p. 3.

As the Memorandum of the United States makes clear, the court below could not properly "write the principle of priority into the statute as an indirect result of its power to scrutinize legal errors. . . ." *FCC* v. *Pottsville Broadcasting Co., supra,* 309 U.S. at 145.[37] The court was in error when—in derogation of the separation of powers—it wrote into law its own perception of the proper weights to be assigned to diversity and divestiture, in the guise of correcting purported Commission irrationality.[38]

---

[37] In *FCC* v. *Pottsville Broadcasting Co., supra,* 309 U.S. at 135, the Court said that "an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *See also NLRB* v. *Food Store Employees Union,* 417 U.S. 1, 9 (1974). This principle permits the agency to hew to its legislative policy determinations corrected only for legal, rather than policy, errors.

[38] *See National Broadcasting Co.* v. *FCC,* 516 F.2d 1101, 1159, n. 8 (D.C. Cir. 1975), *cert. denied sub nom. Accuracy in Media, Inc.* v. *National Broadcasting Co.,* 424 U.S. 910 (1976), where Bazelon, J., in his dissent from the order vacating the previous order granting rehearing *en banc,* noted that this principle had too often been honored in the breach.

C. The Court Below Trespassed On The Principle Of Separation Of Powers.

Limitations on judicial review have been mandated by this Court for substantial, practical, and more importantly, constitutional reasons. These limitations cannot—and should not—now be overturned. To do so would be to do violence not only to the constitutional doctrine of separation of powers, but also to wise judicial administration.

The Constitution sets up three branches of government, the Legislature, the Executive and the Judiciary. Judicial overreaching transgresses these constitutionally required boundaries. Rulemaking is closely akin to legislation. Some would argue that it is essentially delegated authority to legislate. If Congress were to pass a statute identical to the rules promulgated by the Commission, it is highly unlikely that such a statute would be challenged as irrational because it included a grandfather provision. A court cannot so challenge a legislative rule without transgressing the Constitutional boundaries.

In addition, selection of the appropriate policies to achieve the mandate of a statute, and of the particular means to promote these policies are an "administrative not a judicial decision." *FPC* v. *Idaho Power Co., supra,* 344 U.S. at 21.[39] A court may not make such administrative decisions under the guise of holding regulations to be "arbitrary and capricious" or irrational as a means of cloaking its underlying determination that the regulations "are unwise, that they are not

---

[39] Additionally, licensing, which is what the Commission's orders were dealing with, is a "purely administrative" function. *Federal Radio Commission* v. *General Electric Co.,* 281 U.S. 464, 467 (1930).

likely to succeed in accomplishing what the Commission intended. . . . 'We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission'." *National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 244, *citing Board of Trade* v. *United States,* 314 U.S. 534, 548 (1942). *See also Radio Corp. of America* v. *United States,* 341 U.S. 412, 420 (1951).[40] A constitutional court "cannot . . . participate in the exercise of functions which are essentially legislative or administrative." *Federal Radio Commission* v. *General Electric Co.,* 281 U.S. 464, 469 (1930).

The Chain Broadcasting Regulations, which *inter alia* limited the number of stations which could be owned by a network, were designed to ensure that licensees make the fullest and most effective use of available channels. *National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 218. In reviewing those Regulations, this Court said: "It is not for us to say that the 'public interest' will be furthered or retarded by the . . . regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise." *National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 224. *See also American Telephone & Telegraph Co.* v.

[40] In the *RCA* case, which involved standards for color television transmission, the Court noted that although the wisdom of the Commission's decision might be contested, and indeed, that two Commissioners had dissented from it, "the courts should not overrule an administrative decision merely because they disagree with its wisdom." *Accord: Radio Relay Corp.* v. *FCC,* 409 F.2d 322, 326 (2d Cir. 1969); *Cornell* v. *United States,* 427 F.2d 680, 683-684 (2d Cir. 1970); *FCC* v. *Schreiber,* 381 U.S. 279 (1965). *Cf.* Skelly Wright, "The Courts and The Rule Making Process: The Limits of Judicial Review," 59 Corn. L. Rev. 375, 391 (1974).

United States, 299 U.S. 232, 236-237 (1936). By ordering that the Commission must give diversification "controlling weight" (FCC App. E, p. 167), the court below disregarded these precepts and "usurped an administrative function." *FPC* v. *Idaho Power Co., supra,* 344 U.S. at 20."

This Court has noted that there are practical reasons, as well as constitutional reasons, which should prevent judicial overreaching and rulemaking. For example, *ad hoc* determination by a reviewing court should not foreordain or disturb an agency's orderly development of policy. *United States* v. *Saskatchewan Minerals,* 385 U.S. 94 (1966); *FPC* v. *Idaho Power Co., supra.* "[T]he exercise of [the Commission's] functions gives it accumulating insight not vouchsafed to courts dealing episodically with the practical problems involved. . . ." *FCC* v. *RCA Communications, Inc.,* 346 U.S. 86, 96 (1953). Judicial imposition of a rule improperly impinges on the agency's duty to reconsider the entire case. *United States* v. *Saskatchewan Minerals, supra.* Judicial assumption of the power to make ultimate policy decisions is "not conducive to the development of habits of responsibility in administrative agencies." *FCC* v. *Pottsville Broadcasting Co., supra,* 309 U.S. at 146. It is similarly not conducive

[41] *Cf. National Ass'n of Independent Television Producers and Distributors* v. *FCC,* 516 F.2d 526, 543 (2d Cir. 1975), where the court held that the Commission cannot be compelled to adhere to an order with certain parts deleted by the court. Accordingly, the case was remanded to the Commission to be reconsidered in light of the court's opinion. A similar result was reached in *National Ass'n of Motor Bus Owners* v. *FCC,* 460 F.2d 561 (2d Cir. 1972), where the court found that remand was the only course when it had determined that the Commission had not made the requisite finding. It did not make that finding itself.

to orderly and sound judicial administration. This Court has warned that the administrative process and the courts "are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other." *United States* v. *Morgan*, 313 U.S. 409, 422 (1941). "Courts and administrative agencies are not to be regarded as competitors in the task of safeguarding the public interest." *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 15 (1942). The court below, in commanding the Commission to adopt a certain rule, failed to respect the independence and the assigned function of the Commission.

III.

THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE COMMISSION'S DETERMINATION THAT ITS NEW RULE SHOULD NOT GENERALLY BE APPLIED RETROACTIVELY WAS IRRATIONAL.

The court of appeals upheld the Commission's prohibition of new cross-ownerships of daily newspapers and broadcast facilities. But it then concluded that failure to give this prohibition retroactive effect and eliminate all existing cross-ownership was irrational. (FCC App. E, p. 165.) This conclusion, extrapolated from the Commission's orders, and assertedly based on logic, was not and cannot be supported. It flies in the face of settled ideas about the desirability of retroactive administrative action, and the long-established proper practices of the Commission, the Congress and many courts, including this Court.

A. Rationality Does Not Require Retroactivity.

An agency may give retroactive effect to a regulation. Indeed, as this Court has noted, every new administrative principle may have some retroactive effect. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1946). But retroactivity is not compelled in order for a regulation to be considered rational and valid. The usual question is not whether reason compels retroactivity, but whether retroactivity can meet the test of reasonableness. *Ibid. See, e.g., General Telephone Co. of the Southwest* v. *United States*, 449 F.2d 846, 863 (5th Cir. 1971) ("Where a rule has retroactive effects, it may nonetheless be sustained *in spite of* such retroactivity if it is reasonable.") (emphasis added); *Niagara Mohawk Power Corp.* v. *FPC*, 379 F.2d 153 (D.C. Cir. 1967). The court of appeals has held that even though the agency charged with administering the statute has found no harm to the public from making its new rule with respect to cross-ownership generally prospective only, the absence of retroactive operation is not rational. This stands logic, experience and precedent on its head.

This Court's decisions show that retroactivity is not mandatory for administrative actions. Nearly a century and a half ago, in *United States* v. *McDaniel*, 7 Peters 1, 14 (1833), this Court dealt with administrative practices affected by a later statute. It said: "And no change of such usages can have a retrospective effect, but must be limited to the future." More recently, this Court has said that in administrative action, "law should avoid retroactivity as much as possible." *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 620 (1944). In determining whether it is permissible —not mandatory—for an administrative agency to give retroactive effect to its actions, "Retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to

legal and equitable principles." *SEC* v. *Chenery Corp., supra,* 332 U.S. at 203.[42]

Retroactive application of the Commission's order must also be balanced against equitable and legal principles—a process the court below eschewed. The practice of the Commission in regard to cross-ownership had been well-settled when the order at issue here was adopted. (FCC App. B, p. 90.) No change in circumstances had occurred. The Commission carefully considered and balanced the potential mischief which might result from retroactive application of its order. *See* pp. 22-24, *supra,* and FCC App. B, pp. 89, 93, 95. A court cannot rightly undertake to restrike that balance.

Legal considerations also support non-retroactive application of the Commission's order. The Commission was engaged in a rulemaking proceeding. This is essentially legislative action. Legislation takes a prospective course. This Court has upheld legislative "grandfathering," or prospective-only application of a statute, as a permissible means to respond to "the felt need for regulating . . . through familiar administrative devices, while at the same time [satisfying] the dictates of fairness by affording sanction for enterprises theretofore established." *United States* v. *Maher,* 307 U.S. 148, 153 (1939). The same considerations are applicable to rulemaking. Prospective-only operation for legislation is derived from an enduring and strongly felt distaste for retroactive lawmaking, rooted in concepts of due process and, as the Court

[42] *See also Retail, Wholesale and Dep't Store Union* v. *NLRB,* 466 F.2d 380, 390 (D.C. Cir. 1972), for a reformulation and application of this test by the court of appeals.

noted in *United States* v. *Maher, supra,* fairness.[43]

One expression of this basic distaste for retroactive lawmaking has been the general rule that ambiguous statutes are presumed, in the absence of contrary intent, to operate prospectively only. "Retroactivity, even where permissible, is not favored, except upon the clearest mandate." *Claridge Apartments Co.* v. *Comm'r,* 323 U.S. 141, 164 (1944). *See also Hassett* v. *Welch,* 303 U.S. 303, 314 (1938), where this Court said that settled rules of statutory construction "teach that a law is presumed, in the absence of clear expression to the contrary, to operate prospectively . . ." The court of appeals would reverse this presumption against retroactive application of legislation. It would require retroactivity without any statutory mandate whatever, in the absence of a showing in support of non-retroactivity which it deems compelling. In effect, the court below created a presumption in favor of retroactivity which, it concluded, the Commission failed to overcome.

B. Retroactivity Has Not Been Required For The Validity Of Rulemaking, Legislation Or Judicial Action.

The novel and unsupported position of the court of appeals that prospective-only rulemaking is irrational and therefore invalid contravenes past precedents in regard not only to the Commission's actions, and those of other administrative agencies, but also in

[43] "Retrospective laws are, indeed, generally unjust; and as has been forcibly said, neither accord with sound legislation nor with fundamental principles of the social compact." Story, *Constitution,* § 1398 (1898). In the area of criminal laws, this principle is so fundamental that the Constitution, Art. I, § 9, cl. 3, prohibits the making of *ex post facto* laws. *See Calder* v. *Bull,* 3 Dall. 386 (1798).

regard to the Congress, state courts, and indeed this Court.

1. *Prospective-only Commission Rules.*

Not only is prospective-only application of Commission regulations commonplace,[44] but also such prospective-only applications of Commission regulations

[44] In changing policies, previously approved non-conforming arrangements have frequently been grandfathered by the Commission. Other distinctions between prospective and retroactive applications of Commission regulations have frequently been made. *See, e.g., Revision of FM Broadcast Rules,* 40 F.C.C. 660, ¶¶ 91-100 (1962) (adoption of FM table of assignments with grandfathering of existing stations having non-conforming antenna height or broadcast power); *Distribution of Television Broadcast Signals by CATV Systems,* 2 F.C.C.2d 725, 784 (1966) (rules limiting signal carriage by cable television systems with grandfathering of non-conforming systems already in operation); *Cable Television Report and Order,* 36 F.C.C.2d 143, 185 (1972) (revision of cable signal carriage rules with grandfathering of non-conforming existing systems); *Telephone Terminal Equipment Rules,* 59 F.C.C.2d 83 (1976) (certain types of terminal equipment grandfathered under registration program).

The Commission has made similar distinctions in regard to new rules to promote diversification of ownership. *See, e.g., Multiple Ownership of Standard, FM, and Television Broadcast Stations,* 45 F.C.C. 1476 (1964); *Hearings on Application for Second VHF Station,* 3 P&F Radio Reg. 2d 909 (1964); *Interim Policy on Television Multiple Ownership,* 5 P&F Radio Reg. 2d 271 (1965); *Multiple Ownership of Television Broadcast Stations,* 12 P&F Radio Reg. 2d 1501, 1507 (1968); *Multiple Ownership of Standard, FM & TV Broadcast Stations,* 22 F.C.C.2d 306 (1970); *Multiple Ownership Rules,* Docket 20548, 63 F.C.C. 2d 824 (1977).

The Commission also adopted a rule essentially identical to the one at issue here in regard to cable television and television cross-ownership. *CATV-TV Cross-Ownership Rules,* 55 F.C.C.2d 540 (1975), *reconsideration denied,* 58 F.C.C.2d 596 (1976), *appeal pending,* No. 75-1933, *et al.* (D.C. Cir. 1975), *motions for partial stay granted,* June 10, 1977.

have been frequently upheld by the courts without any equation of prospectivity with irrationality.[45]

2. *Prospective-only Rules By Other Agencies.*

In regard to other agencies, prohibition of—rather than requirement of—retroactive application of new agency rules has been mandated by the courts in recognition of the potential for unfairness inherent in retroactive rules. *See, e.g., Retail, Wholesale and Dep't Store Union* v. *NLRB,* 466 F.2d 380, 390 (D.C. Cir. 1972); *NLRB* v. *E&B Brewing Co.,* 276 F.2d 594, 600 (6th Cir. 1960); *Maceren* v. *District Director, Immigration & Naturalization Service,* 509 F.2d 934, 940

[45] Commission regulations involving prospective-only application or "grandfathering" have been upheld in the following cases:

National Broadcasting Co. v. *United States, supra,* 319 U.S. at 207 (prohibition of ownership of two stations in the same area by one network and network ownership of stations in communities with so few stations or unequal coverage that competition would be restricted was upheld without requiring divestiture of all such network-owned stations);

United States v. *Storer Broadcasting Co.,* 351 U.S. 192 (1956) (Multiple Ownership Rules prohibiting granting of new licenses to owners of 7 AM, 5 FM and 5 TV stations upheld without requirement of divestiture, even though the rules were designed to "avoid overconcentration of broadcasting facilities." *Id.,* at 193.);

Committee for Open Media v. *FCC,* 533 F.2d 1 (D.C. Cir. 1976) (grant of grandfather status to cable television system with fewer than 50 subscribers at effective date of Commission regulation requiring cable television systems to have a certificate of compliance upheld);

Columbus Broadcasting Coalition v. *FCC,* 505 F.2d 320, 324 (D.C. Cir. 1974) (implicit approval of grandfathering interests which did not conform to "one to a market rule," *Multiple Ownership of Standard, FM and TV Broadcast Stations,* 22 F.C.C. 2d 306 (1970);

Buckeye Cablevision, Inc. v. *FCC,* 387 F.2d 220 (D.C. Cir. 1967) (grandfathering cable television system importation of

(9th Cir. 1974). *Cf. NLRB* v. *Majestic Weaving Co.*, 355 F.2d 854, 860-861 (2d Cir. 1966). Indeed, this Court has expressly held that an agency may use its adjudicatory powers to promulgate requirements that are purely prospective in effect. *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969);[46] *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

3. *Prospective-only Legislation.*

As discussed above, legislation, the functional and legal parent of rulemaking, can take a prospective course, and, indeed, in the absence of contrary intent, is deemed not to admit of a retroactive effect. Prospectivity in legislation is not equated with irrationality.

4. *Prospective-only Holdings By This and Other Courts.*

This Court has held that state courts need not give their decisions retroactive effect in other cases. *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). State courts have frequently overruled decisions by prospective-only application of their holdings.[47] It seems rather difficult to sustain the

---

distant signals permissible in order to avoid unnecessary disruption of viewing habits);

Jefferson Standard Broadcasting Co. v. *FCC*, 297 F. Supp. 784, 785 (W.D.N.C. 1969) (recognition of grandfathering in regard to prohibition of improvement of broadcast television signals under common ownership).

[46] One comment has suggested, in analyzing this case, that "the vesting of rulemaking power in agencies suggests that Congress was willing to have them act prospectively in general." "The Supreme Court, 1968 Term," 83 Harv. L. Rev. 62, 224 (1969).

[47] State court prospective overrulings have dealt with a number of legal principles with substantial consequences. Among these are governmental tort immunity, *see, e.g., Dawson* v. *Olsen*, 94 Idaho 636, 496 P.2d 97 (1972); *Molitor* v. *Kaneland Community Unit Dist. No. 302*, 18 Ill.2d 11, 163 N.E.2d 89 (1959); charitable tort immunity, *see, e.g., Burns* v. *Owens*, 459 S.W.2d 303 (Mo. 1970); *Parker* v. *Port Huron Hospital*, 361 Mich. 1, 105 N.W.2d 1 (1960); *Kojis* v. *Doctors Hospital*, 12 Wis.2d 367, 107 N.W.2d 131, *modified on rehearing*, 107 N.W.2d 193 (1963); intra-family tort immunity, *see, e.g., Vickers* v. *Vickers*, 109 N.H. 169, 242 A.2d 57 (1968); *Schwartz* v. *U.S. Rubber Corp.*, 112 N.J. Super. 595, 272 A.2d 310 (1971); *Fountain* v. *Fountain*, 214 Va. 347, 200 S.E.2d 513 (1973), *cert. denied*, 416 U.S. 939, *rehearing denied*, 417 U.S. 927 (1974); *Balts* v. *Balts*, 273 Minn. 419, 142 N.W.2d 66 (1966); *Goller* v. *White*, 20 Wis.2d 402, 122 N.W.2d 193 (1963); and allocation of income between life tenant and remainderman, *see, e.g., Langdell* v. *Dodge*, 100 N.H. 118, 122 A.2d 529 (1956). For other examples of state court prospective-only rulings, *see Comment Note*, "Prospective or Retroactive Operation of Overruling Decision," 10 A.L.R. 3d 1371 (1966).

See also Schaefer, "The Control of 'Sunbursts': Techniques of Prospective Overruling," 42 N.Y.U. L. Rev. 631 (1967).

suggestion that this Court's decision, by failing to require retroactivity, was irrational.[48]

This Court, in civil as well as in criminal litigation, has held that its decisions can be applied prospectively.[49] For example, in *Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969), the Court, in order to avoid "injustice or hardship," applied prospectively only its decision that a state law providing that only "property

---

[48] *See also Action for Children's Television* v. *FCC*, Case No. 74-2006 (D.C. Cir., July 1, 1977), in which one panel of the court of appeals refused to apply another decision of the court retroactively.

[49] *See* Beytagh, "Ten Years of Non-Retroactivity: A Critique and a Proposal," 61 Va. L. Rev. 1577 (1975) for a thorough discussion of this subject. Dean Beytagh distinguishes between (1) "pure prospectivity," decisions which govern "only future cases and [apply to] neither the parties before the court nor any previous or pending cases," (2) "non-retroactivity," or decisions which govern "future cases as well as litigants at bar but not previous or pending cases," and (3) "retroactivity" or decisions which govern

taxpayers'' could vote in elections called to approve issuance of bonds by a municipal utility system was invalid under the Fourteenth Amendment. Similarly, in *City of Phoenix* v. *Kolodziejski,* 399 U.S. 204, 213-215 (1970), the Court applied prospectively its decision that a state could not restrict to real property taxpayers the vote to approve general obligation bonds, on the ground that giving retroactive effect to its decision would be "unjustifiably disruptive." *England* v. *Louisiana State Bd. of Medical Examiners,* 375 U.S. 411, 422 (1964), involved the prospective-only application of a decision in regard to the presentation of federal claims in a state court after an abstention order of a federal court. *Allen* v. *State Bd. of Elections,* 393 U.S. 544, 572 (1969), involved the prospective-only application of a decision interpreting the application of Section 5 of the Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. § 1973 *et seq.* (1964 ed., Supp. I), and refusing to invalidate elections challenged pursuant to this section. *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 105-107 (1971), where the Court thoroughly discussed the principles of non-retroactivity, involved a decision not to apply retroactively a state one year statute of limitations in personal injury actions. *Cf. Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481, 496 (1968); *United States* v. *Estate of Donnelly,* 397 U.S. 286, 295 (1970); *Simpson* v. *Union Oil Co.,* 377 U.S. 13, 25 (1964); *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371 (1940); *Lemon* v. *Kurtzman,* 411 U.S. 192 (1973).

Cases in which the Court refused to apply its decisions in criminal matters retroactively are perhaps

"future cases, the present litigants, and all fact situations arising before the date of the law-changing decision that are reviewable either by direct appeal or by collateral attack." *Id.,* at 1157, n. 2.

better known, and certainly more numerous. This Court held that embezzled funds were income, but limited that holding to prospective effect only. *James* v. *United States,* 366 U.S. 213 (1961). Among the Court's other decisions in the criminal area are: *Linkletter* v. *Walker,* 381 U.S. 618 (1965);[50] *Tehan* v. *United States ex rel. Shott,* 382 U.S. 406 (1966);[51] *Johnson* v. *New Jersey,* 384 U.S. 719 (1966);[52] *Stovall* v. *Denno,* 388 U.S. 293 (1967);[53] *Desist* v. *United States,* 394 U.S. 244 (1969);[54] *Halliday* v. *United States,* 394 U.S. 831 (1969);[55] *Williams* v. *United States,* 401 U.S. 646 (1971);[56] *Mackey* v. *United States,* 401 U.S. 667

[50] Exclusionary rule announced in *Mapp* v. *Ohio,* 367 U.S. 643 (1961), held inapplicable to cases in which convictions had become final before the date *Mapp* was announced. The Court noted also that the rule of non-retroactivity could be applied in constitutional as well as non-constitutional cases, *Linkletter* v. *Walker, supra,* 381 U.S. at 628, and that "the Constitution neither prohibits nor requires retroactive effect." *Id.* at 629.

[51] Prohibition of prosecutor's comment on defendant's failure to testify, announced in *Griffin* v. *California,* 380 U.S. 609 (1965), not applied retroactively.

[52] Rules about self-incrimination announced in *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), and *Miranda* v. *Arizona,* 384 U.S. 436 (1966), not applied retroactively. *See also Jenkins* v. *Delaware,* 395 U.S. 213 (1969).

[53] Requirements of counsel in regard to pretrial line-ups, announced in *United States* v. *Wade,* 388 U.S. 218 (1967), and *Gilbert* v. *California,* 388 U.S. 263 (1967), not applied retroactively.

[54] Rule that physical trespass need not be shown to establish Fourth Amendment search-and-seizure violation, announced in *Katz* v. *United States,* 389 U.S. 347 (1967), not applied retroactively. *See also Michigan* v. *Tucker,* 417 U.S. 433 (1974).

[55] This decision, construing Rule 11 of the Federal Rules of Criminal Procedure concerning guilty pleas, held non-retroactive.

[56] Rules in regard to search-and-seizure, enunciated in *Chimel* v. *California,* 395 U.S. 752 (1969), held non-retroactive.

(1971);[57] *Adams* v. *Illinois,* 405 U.S. 278 (1972);[58] *Michigan* v. *Payne,* 412 U.S. 47 (1973);[59] *Gosa* v. *Mayden,* 413 U.S. 665 (1973);[60] *Daniel* v. *Louisiana,* 420 U.S. 31 (1975);[61] *United States* v. *Peltier,* 422 U.S. 531 (1975).[62] Recently the Court decided that the *Miller*[63] definition of obscenity could not constitutionally be applied retroactively against the interest of an accused. *Marks* v. *United States,* 430 U.S. 188 (1977).

As the Court noted in *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 106 (1971), ". . . in the last few decades, we have recognized the doctrine of non-retroactivity outside the criminal area many times, in both constitutional and nonconstitutional cases." (Citations omitted.) The Court said, *id.,* at 106-107, that three separate factors guide its decisions:

---

[57] Rules in regard to self-incrimination enunciated in *Marchetti* v. *United States,* 390 U.S. 39 (1968), and *Grosso* v. *United States,* 390 U.S. 62 (1968), held not retroactive.

[58] *Coleman* v. *Alabama,* 399 U.S. 1 (1970) requirement of counsel at pretrial hearing held non-retroactive.

[59] Resentencing rule enunciated in *North Carolina* v. *Pearce,* 395 U.S. 711 (1969), held non-retroactive.

[60] Decision in *O'Callahan* v. *Parker,* 395 U.S. 258 (1969), that persons in armed forces are entitled to a civilian trial for non-service-connected offenses held non-retroactive.

[61] Decision in *Taylor* v. *Louisiana,* 419 U.S. 522 (1975), in regard to discrimination against women in jury service held non-retroactive.

[62] Decision in *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973), invalidating warrantless searches by border patrol agents acting without probable cause held non-retroactive. *Cf. Bowen* v. *United States,* 422 U.S. 916 (1975).

[63] *Miller* v. *California,* 413 U.S. 15 (1973) (setting new standards to isolate "hard-core pornography" from speech protected by the First Amendment.)

[1] "the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . ." (citations omitted);

[2] "it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation'," *citing Linkletter* v. *Walker,* 381 U.S. 618, 629 (1965);

[3] "Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity'," *citing Cipriano* v. *City of Houma,* 395 U.S. 701, 706 (1969).

In reaching the conclusion that its new rule in regard to cross-ownership should be applied prospectively-only, except in certain limited circumstances, the Commission dealt with—and complied with—each of these guidelines. Its new rule did establish a "new principle" in that it overruled the past precedent of permitting and in many instances, encouraging cross-ownership. *See* discussion p. 13, *supra* and n. 19, *supra.* The Commission balanced the history, purpose and effect of prospective only application of the rule. (FCC App. B, pp. 93-98.) The Commission clearly was concerned not only with the potential inequitable results of applying its rule retroactively (FCC App.

B, p. 93), but also with its overall effect on the public interest.

Having followed each of the standards which this Court has set forth to guide its own decisions in regard to retroactivity, it cannot reasonably be contended that this decision of the Commission was irrational.

CONCLUSION

The decision of the court below amounts to usurping the administrative functions of the Commission. There is no basis, either legal or practical, for the court's conclusion that the Commission's determination to make its rule prospective-only except in limited circumstances was irrational. Accordingly, this Court should reverse the decision of the court of appeals.

Respectively submitted,

ERWIN N. GRISWOLD
VICTOR E. FERRALL, JR.
LINDA K. SMITH

Attorneys for Amici Curiae
Dispatch Printing Company
and The Journal Company

Of Counsel:

JONES, DAY, REAVIS & POGUE

November, 1977